

The B-BBEE Policy Unit

The Department of Trade and Industry

Attention: Jacques Manus

By e-mail: JManus@thedti.gov.za

14 August 2018

Dear Mr Manus

WRITTEN SUBMISSIONS ON PROPOSED AMENDMENTS TO SCHEDULE 1 & CODE SERIES 400

1. INTRODUCTION

BUSA welcomes the opportunity to submit written comments on the following proposed amendments published in Gazette 41709 on 15 June 2018 in terms of section 9(5) of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 ("B-BBEE Act"):

- Draft Schedule 1, Part 2 ("Draft Schedule 1") of 2018; and
- Draft Code Series 400 of 2018 ("the Draft Code").

2. BACKGROUND TO BUSA

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents a broad spectrum of South African business, large and small across the economy on macro-economic and cross-cutting policies and issues that affect business at national and international levels.

BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive. As the principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory.

3. KEY AMENDMENTS

3.1 The key amendments proposed in Draft Schedule 1 and the Draft Code are as follows:

- 3.1.1 the insertion of new amendments aimed at clarifying the employment objectives of the Revised B-BBEE Codes;
- 3.1.2 the combination and reallocation of points and targets for spend with EMEs and QSEs under the Preferential Procurement Scorecard;
- 3.1.3 increasing the points obtainable from procuring from 51% black-owned suppliers from 9 to 11 and increasing the target from 40% to 50%;
- 3.1.4 an enhanced recognition of two times of actual spend for procurement spend on entities which are at least 51% black-owned on a flow-through basis, while first time supplier recognitions falls off;
- 3.1.5 to include large entities which are 51% black-owned (on a flow-through basis) as beneficiaries of enterprise development or supplier development initiatives;
- 3.1.6 defining what a “supplier development beneficiary” is and what an “Enterprise Development Beneficiary” is; and
- 3.1.7 procurement spend from Generic Entity Suppliers which are at least 51% black owned or at least 51% Black women owned utilising the flow through principle can be recognised under Indicator 2.1.2 of the Enterprise and Supplier Development Scorecard.

4. GENERAL COMMENTS

- 4.1 While the proposed amendments appear to support Government’s goal of radical economic transformation by promoting more black ownership and control in South African businesses, they also result in significant consequences for small businesses and new black businesses.
- 4.2 As previously indicated to the DTI in BUSA’s May 2018 written submission in response to the proposed amendments to the Draft Codes of Good Practice (on YES and skills development), BUSA adopted a Business Approach to Black Economic Transformation for Inclusive Growth in 2017. This Transformation Approach recognises that the pace and depth of transformation in business has been insufficient, and that concerted steps should be taken to accelerate the pace of transformation within business. Business identified four key drivers of transformation being: inculcating diversity within business; promoting education and skills; lifting employment, particularly among the youth; and enabling many more small and emerging black businesses to participate in the economy. It is in this light that BUSA is concerned that some of the most recent proposed amendments may inadvertently undermine, rather than support the pace of transformation necessary in South Africa.

4.3 The proposed amendments signal a focus on the development of larger black-owned companies to the detriment of the the spend with smaller companies. BUSA is concerned that this will, to a large extent, diminish the incentive for businesses to procure the services of new and/or small suppliers.

4.4 BUSA is also concerned that the rate at which B-BBEE legislation amendments are being introduced will have the effect of slowing down the momentum of transformation. It has taken businesses a considerable amount of time to align and implement programmes and initiatives associated with enterprise and supplier development that are consistent with the spirit of the current B-BBEE requirements. To significantly and frequently amend these will have a negative impact on those businesses that have meaningfully committed to long term B-BBEE initiatives and programmes.

4.5 BUSA's detailed comments are set out below.

5. COMMENTS ON DRAFT CODE SERIES 400

5.1 Combining the EME and QSE Indicators into one Indicator

5.1.1 The Draft Code proposes that the two separate Indicators for purchases from EMEs and QSEs should be merged into one Indicator with a target of 25%, worth 5 points.

5.1.2 Although it is proposed that the two separate Indicators be merged, the weighting points and compliance targets in the merged Indicator will, overall, be reduced.

5.1.3 There is a strong likelihood that by merging the EME and QSE Indicators (and reducing the overall points and compliance targets) that opportunities may be diverted away from EMEs to QSEs.

5.1.4 The Ministry of Small Business Development and the National Development Plan recognise the important role that SMMEs play in the social and economic development of South Africa. SMMEs are a primary source of job creation. In order to create new jobs and sustain existing jobs, the B-BBEE requirements should support the growth and sustainability of existing SMMEs and importantly, enable new SMMEs to prosper. To remove procurement from EMEs as a specific target in the scorecard and to reduce the overall weight for procurement from EMEs and QSEs ignores the vital role SMMEs play in our economy.

5.1.5 Since the amendments to the Codes in 2013, businesses have invested significantly in strategies and intervention programmes with their suppliers to meet the existing B-BBEE requirements. In circumstances where long term contracts have been entered into with suppliers, these most recent proposed changes will result in businesses having to re-orientate processes and commercial agreements which would, in most instances, be onerous.

5.1.6 For the reasons set out above, BUSA is of the view that EME and QSE Indicators should remain unchanged and should not be merged.

5.2 **Purchases from 51% Black-owned suppliers**

5.2.1 The Draft Code proposes that Indicator 2.1.4 relating to purchases from 51% black-owned suppliers should become Indicator 2.1.3 and the points should be increased from 9 to 11 and the target increased from 40% to 50%.

5.2.2 By increasing the points for procurement spend from Empowering Suppliers that are at least 51% black-owned, this could, inadvertently result in less emphasis on small businesses. In light of the comments set out in paragraph 5.1 above, careful consideration should be given to the impact that this proposed amendment may have on small businesses.

5.3 **Spend with First Time Suppliers**

5.3.1 The Draft Code proposes, under the Key Measurement Principles section that the multiplying factor for spend with first time suppliers should be removed from Code Series 400.

5.3.2 The consequence of this proposed amendment is that companies will no longer be able to multiply it's spend on first time suppliers by a factor of 1.2 (20%).

5.3.3 BUSA is concerned that by removing this multiplying factor from Code Series 400, that there will be no incentive for companies to bring a new supplier on board which will ultimately limit the potential business opportunities for SMME's and start-ups. BUSA is therefore of the view that Indicator 3.5.3 should remain in Code Series 400.

5.4 **Spend on 51% Black Owned & 51% Black Owned Female Suppliers**

5.4.1 The Draft Code proposes a new insertion into the Key Measurement Principles which states that:

"A supplier to the Measured Entity that is at least 51% Black Owned or at least 51% Black Woman Owned utilising the Flow Through Principle, the recognizable B-BBEE Procurement Spend that can be attributed to that Supplier is multiplied by a factor of 2." (sic)

5.4.2 It appears that by the insertion of this new provision, there is a risk that black procurement spend may be inflated beyond the actual transformation taking place. This is particularly so given that there is already enhanced recognition through the B-BBEE levels. It is important for the DTI to carefully assess whether this would result in limiting the depth of transformation that the B-BBEE Act seeks to achieve and if so, to re- consider the introduction of this enhanced benefit.

5.5 Beneficiaries of Supplier Development or Enterprise Development

- 5.5.1 The Draft Code proposes that Generic Entities should, in addition to EMEs and QSEs, be included as beneficiaries of supplier development or enterprise development.
- 5.5.2 BUSA does not support this proposed amendment. In terms of the current Code, the aim is for a Measured Entity to support small black-owned businesses with a view to assisting them to eventually form part of the supply chain.
- 5.5.3 If a Generic Entity is eligible to benefit from supplier development and enterprise development, this will no doubt limit small businesses' access to markets and will slow down the pace of transformation which again, is not the aim of the B-BBEE Act.
- 5.5.4 BUSA is of the view that supplier and enterprise development initiatives should continue to be directed to QSEs and EMEs. QSEs and EMEs require more attention and support than well-established Generic Entities.

5.6 Supplier Development Beneficiary vs Enterprise Development Beneficiary

- 5.6.1 The Draft Code (3.8) attempts to give clarity as to what is considered a "Supplier Development Beneficiary" and what is considered an "Enterprise Development Beneficiary".
- 5.6.2 The Draft Code proposes that a Supplier Development Beneficiary is part of the Measured Entity's supply chain whereas an Enterprise Development Beneficiary is not. BUSA's understanding is that this means that a Supplier Development Beneficiary would invoice the Measured Entity, whereas the Enterprise Development Beneficiary would not.
- 5.6.3 By inserting this definition into the Draft Code, it means that if a Measured Entity wishes to continue supporting an existing Enterprise Development Beneficiary who is also an existing supplier, which the Measured Entity will have to stop procuring from such beneficiary. This will have a negative impact on many small businesses.
- 5.6.4 We suggest the following wording of this definition would provide clarity:

Supplier Development Beneficiary is part of the measured entity's supply chain where there is a direct transacting relationship.

Enterprise Development Beneficiary is part of the measured entity's value chain where there is an indirect transacting relationship."

5.7 B-BBEE Procurement Spend from Generic Entity Suppliers

- 5.7.1 The Draft Code proposes a new insertion under 3.9. This new insertion states that B-BBEE procurement spend from Generic Entity Suppliers which are at least 51% black owned or at

least 51% Black women owned utilising the flow through principle can be recognised under Indicator 2.1.2 of the Enterprise and Supplier Development Scorecard.

- 5.7.2 Of significance to this new insertion is the fact that Indicator 2.1.2 is the EME and QSE spend.
- 5.7.3 Subject to further clarity from the DTI, BUSA's understanding is that this new insertion effectively means that Measured Entities have an option to rather support already larger established companies instead of supporting smaller suppliers. By implication this means, by way of example, that should a Measured Entity procure at least 25% of discretionary spend from a Level 4 Generic supplier with 51% Black Ownership, such Measured Entity would score full points under 2.1.2 without having to procure anything from an EME or QSE supplier. This would significantly limit small businesses' access to markets and is not supported by BUSA.

6. AMENDMENTS TO SCHEDULE 1 (DEFINITIONS)

6.1 Definition of "Absorption" & "Long-Term Contract of Employment"

- 6.1.1 Draft Schedule 1 proposes to amend the definition of "**Absorption**" to mean "*a measure of the Measured Entity's ability to successfully secure a long term contract of employment for the Learner.*"
- 6.1.2 Clarity is required as to which Learners would qualify for the purposes of Absorption. Would it be all learners identified as per the B-BBEE Learning Programme Matrix?
- 6.1.3 Clarity is also required from the DTI as to when absorption will be activated and recognised? Will it only be on completion of a learning programme?
- 6.1.4 Absorption should be realistic and attainable to encourage all businesses to invest in human capital through skills development.
- 6.1.5 In order for Absorption to be activated, the Measured Entity must secure a "long-term contract of employment" for the Learner. Draft Schedule 1 proposes that "**long-term contract of employment**" is to mean "*a legal agreement between an individual and an entity that this individual would work for until his or her mandatory date of retirement.*"
- 6.1.6 The concept of long-term contract of employment is unclear and undefined in South African labour law. This creates unnecessary uncertainty.
- 6.1.7 One interpretation may be that what is meant is employment on indefinite basis. In other words, a fixed term contract, regardless of the length, will not be recognised as a long-term contract of employment and as such, would not activate absorption. This interpretation is limiting and may reduce the number of employment opportunities for Learners which cannot

be the intention of the B-BBEE Act. It also runs counter to employment types that are becoming more and more relevant under the 4th Industrial Revolution. In some sectors, it is not reasonably practicable to offer all employees and/or recently qualified Learners indefinite contracts of employment. South Africa's labour laws expressly recognise the use of fixed term contracts in certain justifiable instances.

- 6.1.8 BUSA accordingly does not support the inclusion of the term "long-term employment" and urges the DTI to consider to include language that makes it unambiguous that flexible and fixed term forms of employment, provided they exceed a certain duration will be satisfactory. It is proposed that consideration be given to inserting a meaningful time period, after which employment, regardless of whether it is fixed term or indefinite, is recognised for this purpose.

6.2 Definition of "Designated Group Supplier"

- 6.2.1 Draft Schedule 1 defines the term "**Designated Group Supplier**" and sets out various categories of ownership.
- 6.2.2 One of the categories of ownership is "*black people living in rural and under developed areas.*" Clarity is required as to what the DTI will consider to be a "*rural and under developed area*".

7. FURTHER AMENDMENTS TO DEFINITIONS SHOULD BE CONSIDERED

- 7.1 It is proposed, in the process of this round of amendments, that the following definitions should be updated:

- 7.1.1 Schedule 1 defines "**Employee with a Disability**" to have the meaning defined in the Code of Good Practice on Key Aspects of Disability in the workplace issued under section 54 of the Employment Equity Act. That Code of Good Practice does not define the term "**employee with a disability**", rather, it defines the term "**persons with disabilities**". The use of language should be aligned if the definition refers to the definition in the Code of Good Practice in terms of the Employment Equity Act, unless the BBEE Codes intend to distinguish between a "person" with a disability and an "employee" with a disability, in which case, the definition as it appears in Schedule 1 should be amended.
- 7.1.2 In so far as Schedule 1 defines "**Junior Management**", "**Middle Management**" and "**Senior Management**", the definitions should be updated to align with the Employment Equity Act and its Regulations which no longer makes reference to occupational "categories" but rather occupational "levels". It would be helpful if the definitions in Schedule 1 are aligned with the corresponding legislation they refer to.

8. CONCLUSION

BUSA has raised a number of serious concerns as set out above, based on input and a mandate received from our members. These concerns speak to the very issues that are currently under discussion in Nedlac in preparation for the Jobs Summit, and BUSA is of the view that the proposed changes would inadvertently counteract the good intentions of all constituencies to promote employment, skills development and growth of small business in the economy. As such, we would welcome any opportunity to engage with the DTI in relation to these submissions.



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